this ground, we would have to be satisfied that injustice had been done to the accused by the exclusion of this evidence.

If it had appeared that there was a material difference between the statements made by the witnesses to the Sub-Inspector, and their statements made in Court, it would have been difficult to say that the accused had not been prejudiced by the Judge's decision on this question.

The Judge says that he has read the statements, and that there is practically no difference between what the persons examined stated and what the witnesses have deposed before both Courts. We see no reason to doubt the correctness of the Judge's statement, and if the legal advisers of the accused had seen any real ground for disputing it, they would have endeavoured to obtain the production of these statements, so that they might have been considered at the hearing of the appeal.

Taking all the circumstances into consideration, we do not think that the omission of the Judge to admit this evidence would justify us in ordering a new trial. On the mere speculation that these statements would disagree, and in face of the Judge's statement that they do not materially disagree, we could not order a new trial.

[Their Lordships then proceeded to determine the case on its merits, and ended in upholding the conviction and reducing some of the sentences.]

H. T. H. *Conviction upheld.*

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Beverley.

KRISTO RAMANI DASSEE (APPELLANT) *v.* KEDAR NATH CHAKRAVARTI AND ANOTHER (RESPONDENTS).*

1889 *January* 16.

Set-off—Civil Procedure Code (Act XIV of 1882), *ss.* 233, 243, 246—*Execution of assigned decree—Set-off against assigned decree partly executed.*

A. B. had obtained a decree against *K.* and *T.* After the decree had been partially satisfied, *A. B.* assigned it to *D.* Prior to the date of the assignment, *K.* and *T.* had instituted a suit against *A. B.* and *D.*, and ultimately obtained a decree against both of them.

* Appeal from Order No. 381 against the order of Baboo Gopal Chunder Bose, Subordinate Judge of Bhagulpore, dated the 25th August 1888.

1889

KRISTO RAMANI DASSEE v. KEDAR NATH CHAKRAVARTI.

Held, that *K.* and *T.* were entitled to set-off their decree against the unexecuted portion of the decree which had been assigned to *D.*

THE appellant, the respondents, and one Anisul Barkat appear to have been co-sharers in a certain putni-tenure. On the 13th June 1883, Anisul Barkat obtained a decree for rent for about Rs. 9,000 against the respondents Kedar Nath Chakravarti and Troylucko Nath Chakravarti. After the decree had been partially satisfied, on the 29th June 1886, Anisul Barkat assigned it to the appellant Kristo Ramani Dassee, a sum of Rs. 5,118-12-3 being then due under it. Meanwhile, on the 3rd February 1885, that is, prior to the date of the assignment, the respondents Kedar Nath and Troylucko Nath instituted a suit against both Anisul Barkat and Kristo Ramani Dassee, the assignor and assignee, for possession and mesne profits in respect of another share in the same putni, and obtained a decree against both of them on the 23rd March 1887.

Under this decree, on the 16th July 1888, mesne profits, as against the assignor Anisul Barkat, were assessed at Rs. 5,187-13-8. While the respondents' suit was pending, Kristo Ramani attempted to execute the decree which had been assigned to her, but was resisted by them. Ultimately she established her right to execute the decree, and also obtained a decree for costs in those proceedings amounting to Rs. 60-3-3. Kristo Ramani thus held decrees against the respondents, Kedar Nath and Troylucko Nath, for an aggregate sum of Rs. 5,178-15-6, in execution of which she attached the same share in the putni, in respect of which they had obtained a decree, and the property was advertized for sale on the 16th July 1888. On that date, as already stated, the respondents had obtained their decree for mesne profits, amounting to Rs. 5,187-13-8, as against Anisul Barkat. As this decree had been obtained in a different Court, the respondents applied for a postponement of the sale in order to enable them to have their decree transferred to the Court which was executing Kristo Ramani's decree. That was done, and the respondents having pleaded their decree by way of set-off, the Lower Court allowed the plea.

From this order Kristo Ramani appealed to the High Court.

Mr. *J. T. Woodroffe*, Baboo *Troylucko Nath Mitter*, and Baboo *Saroda Charan Mitter* for the appellant.

Baboo *Navadip Chunder Roy* for the respondents.

The judgment of the Court (PIGOT and BEVERLEY, JJ., after setting out the facts, proceeded as follows):—

The question raised is shortly this: Whether or not the decree obtained by the respondents against the assignor in a suit which was pending at the date of the assignment, and which had ripened into a decree before the assigned decree was fully executed, can be set-off against the unexecuted portion of the assigned decree. The question for decision depends upon the construction of three sections of the Civil Procedure Code: ss. 246, 243 and 233. By s. 246 a set-off of one decree as against another is allowed. By explanation 2 of that section, it is allowed "where either party is an assignee of one of the decrees, and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself." It was for some time a subject of controversy in this Court, whether in the case of decrees, both of which were in existence but not yet set-off one against the other, upon the assignment of one of them, the right to set-off still subsisted as against the assignee; and after some controversy that question was finally decided in favour of the right to set-off. The case now before us opens a further question, inasmuch as at the date of the assignment of the decree now held by the appellant, the decree held by the respondents had not been made, although their suit had been filed. Section 243 provides that, "if a suit be pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may (if it think fit) stay execution of the decree, either absolutely or on such terms as it thinks fit, until the pending suit has been decided. In s. 233, it is enacted that "every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder." When the appellant took an assignment of this decree, she must have known perfectly well (for it is admitted that she had full notice) of the existence of the suit against herself and her assignor, her co-sharer in the putni.

1889

KRISTO RAMANI DASSEE. v. KEDARNATH CHAKRAVARTI.

A right to set-off the amount of one decree against another was repeatedly referred to, as an equity affecting the latter decree, in the decisions of this Court prior to the Code of 1877, which for the first time enacted section 233. In whatever mode that equitable right could be made to operate as against the holder of the decree, we think it must be allowed to operate against his assignee with notice of the existence of the pending suit. It is clear that, apart from the assignment, the right of set-off as to the unexecuted part of the first decree would exist in the present case under s. 246 against the assignor; and for the reason just stated it must equally exist against the assignee.

We therefore dismiss both appeals with costs. We think that we ought not to be illiberal in assessing the costs in this case, which is an exceedingly oppressive attempt on the part of the appellant; and for that reason, and the importance of the matter, we allow five gold mohurs as the hearing fee in each appeal.

C. D. C. : *Appeal dismissed.*

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

1889
April 16.

KHATU BIBI (DEFENDANT No. 2) *v.* MADHURAM BARSICK (PLAINTIFF).*

Transfer of Property Act (IV of 1882), *s.* 54—*Transfer of immoveable property by unregistered deed—Deed of which registration is optional—Suit by purchaser for possession when vendor is out of possession.*

Section 54 of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immoveable property of less than Rs. 100 should be made only by one of the modes there stated, so as to confer a valid title.

Where the plaintiff bought from the heirs of *M.*, who were out of possession, their right title and interest in certain immoveable property, and such property was conveyed to the plaintiff by an unregistered deed, registration of the deed (the property being of value of less than Rs. 100) not being compulsory: *Held*, in a suit to recover the property from persons in possession without title, that the sale conferred a valid title on

* Appeal from Appellate Decree No. 958 of 1888, against the decree of W. H. M. Gun, Esq., Judge of Noakhali, dated the 13th of February 1888, modifying the decree of Baboo Srigopal Chatterjee, Munsiff of Sundip, dated the 27th of June 1887.

the plaintiff, though not made by registered deed or by delivery of the property.

The *dictum* of Garth, C.J., in *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1) dissented from.

THE facts necessary for the purpose of this report were that the plaintiff sought to recover a share of certain land, after establishment of his *howla* title to it; that the *howla* originally belonged to two persons, Pan Gazi and Mahabat Ali, who died in 1283 (1876) and 1284 (1877), respectively, leaving as their heirs the defendants Nos. 2 to 8; that Khatu Bibi, the defendant No. 2, was the widow of Pan Gazi, and she claimed the whole of the property in dispute, but the lower Appellate Court found that she was entitled only to an eight-anna share which her husband had conveyed to her in lieu of dower by a deed of sale of 30th Assin 1283 (15th October 1876); that the defendants Nos. 1 and 2 had taken possession of the whole of the property after dispossessing the other defendants; and that the other defendants or some of them who had acquired the interest of the others had, while out of possession, sold the remaining eight-anna share (that of Mahabat Ali, whose heirs they were,) to the plaintiff by a deed of sale, dated 6th Choitro 1291 (18th March 1885). This deed of sale was unregistered, the registration of it, as the value of the property was less than Rs. 100, being optional.

The defendants Nos. 1 and 2 were the only defendants who really defended the suit, and by the findings of the lower Courts the defendant No. 2, Khatu Bibi, was alone adversely affected. She consequently appealed to the High Court from the decree of the lower Appellate Court, which gave the plaintiff an eight-anna share of the property.

Baboo *Jaggat Chunder Banerjee* and Baboo *Debendro Mohun Sen* for the appellant.

Baboo *Okhil Chunder Sen* for the respondent.

For the appellant s. 54 of the Transfer of Property Act was referred to, as showing that the transfer of immoveable property must be made either by a registered instrument or by

(1) I. L. R., 8 Calc., 597, at p. 612.

1889

KHATU BIBI v. MADHURAM BARSICK.

delivery of possession; and that under an unregistered deed, although registration was not compulsory, the plaintiff could not obtain a valid title, and the dictum of Garth, C. J., in the case of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1) was referred to in support of this contention.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

The District Judge in appeal has found that plaintiff has bought the right title and interest which Mahabat Ali had in an eight-anna share of a certain *howla*. This was conveyed to the plaintiff by an unregistered document, registration not being compulsory within the terms of s. 17 of the Registration Act, because the value of the property conveyed was less than Rs. 100. The vendors were out of possession when the sale took place, and the plaintiff seeks to obtain possession on this title as against certain defendants who have been found to have no title at all.

The question raised before us on second appeal is whether, having regard to the terms of s. 54, clause 3, of the Transfer of Property Act, the sale to the plaintiff has conferred any valid title, inasmuch as it has not been completed either by a registered document or by delivery of possession of the property sold. As an authority for this, we have been referred to some observations made by the late Chief Justice, Sir R. Garth, in the case of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1). These observations were only *obiter dicta* without any argument at the bar, and are therefore not binding on us, but, as coming from so high an authority, are entitled to every respect and consideration.

The conveyance on which the plaintiff's title depends is one, registration of which, under s. 18 of the Registration Act 1877, is not compulsory, but optional with the parties.

There is no question, in this case, of competition between this document and another executed by the same person and duly registered, so that s. 50 of the Registration Act does not apply. The conveyance therefore is a valid document, receivable in evidence of the transaction affecting the immoveable property

(1) I. L. R., 8 Calc., 597, at p. 612.

with which it professes to deal, and is not affected by the Registration Act. It would convey a good title under which the vendee could sue to obtain the rights conveyed to him as against trespassers who may have unlawfully dispossessed his vendor unless such title be restricted by some special law.

The Transfer of Property Act, s. 54, defines a sale of immoveable property, and declares how it may be made. A sale is defined to be "a transfer of ownership in exchange for a price paid or promised, or part paid and part promised."

In declaring how transfers may be made, the section draws a distinction between transfers of tangible immoveable property of the value of Rs. 100 and upwards, and of the value of less than Rs. 100. Of the former it declares that transfer "can be made only by a registered instrument;" of the latter it declares that "transfer may be made either by a registered instrument or by delivery of the property." But the law does not state that such transfer can be made only by one of these means. Nor, is it anywhere provided that a person out of possession shall not sell to another his right title and interest in any property, nor is it declared that in such a case the transfer can be made only through a registered instrument. The actual rights may, in our opinion, be conveyed through an unregistered instrument, for that, by the Registration Act, is receivable in evidence of the transaction, because the value of the property conveyed is less than Rs. 100. It surely could never have been intended that one who has been found to have no title as the defendant appellant, should on such a plea succeed as against the purchaser of the right title and interest of the lawful owner who has been unlawfully put out of possession. Such an owner cannot complete the transfer of his property by delivery of possession. Was it necessary that the conveyance should have been by a registered instrument so as to confer a valid title? We think not.

Section 18 of the Registration Act expressly declares that an instrument, such as that before us, *may* be registered as distinguished from instruments specified in s. 17, which the law declares *shall* be registered.

1889

KHATU BIBI v. MADHURAM BARSICK.

Section 49 declares that "no document required by s. 17 to be registered shall affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property unless it has been registered under the provisions of the Act," but there is no prohibition in respect to other documents. It is only when a registered document comes into competition with an unregistered document of the same nature, and relating to the same property, that the former takes effect, although registration of the latter may have been optional and not compulsory. We apprehend that it could not have been the intention of the Legislature to allow the law, as expressed in the Registration Act, to remain unrepealed and indirectly to nullify the effect that it has always received by the enactment of s. 54 of the Transfer of Property Act, which has been quoted.

We are not inclined to adopt such a rigid construction of the law as that pressed on us and held by the late Chief Justice, Sir R. Garth, when it would seem that another construction would reconcile the Registration Act with the Transfer of Property Act, so as to prevent what, in this case, would amount to a denial of justice. If such an alteration of the law, amounting to a confiscation of previously existing rights, were contemplated, we apprehend that it would have been expressed in other and clearer terms.

We are therefore of opinion that s. 54, clause 3, of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immoveable property sold, and of small value, should be made only under one of these conditions so as to confer a valid title. In clause (ii) the law is clear that a transfer of immoveable property of a particular description *can be made* only by a registered instrument, but clause 3 uses the expression *may be made*. It does not declare that it may be made *only* and thus repeat an expression first used in the preceding clause. We therefore hold that, on his unregistered conveyance, the plaintiff is entitled to obtain possession of an eight-anna share, and we dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*